LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
MAR 31 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 513.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor,
Appellant,

vs.

UNITED STATES OF AMERICA et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division.

BRIEF FOR APPELLANT.

T. T. RAILEY,
GEO. W. HOLMES,
TOLL R. WARE,
Attorneys for Appellant.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement	3
Specification of Errors	6
Summary of Argument	9
Argument	11
1. There is no evidence of record to support the Commission's finding or conclusion that through routes exist from the Kansas origins involved to Omaha, Nebr., over the lines of the Missouri Pacific and Burlington through Concordia	11
2. Physical track connection between two lines does not in and of itself establish the existence of through routes over those lines	12
3. The Missouri Pacific does not lose its rights under Section 15 (4) of the Interstate Commerce Act by reason of having complied with the provisions of Section 1 (4) of the same Act which requires it to establish reasonable through routes with the Burlington to destinations short of Omaha	14
4. The Missouri Pacific does not lose its rights under Section 15 (4) of the Interstate Commerce Act by reason of having complied with Section 3 (4) of the same Act which requires it to afford all reasonable, proper and equal facilities for the interchange of traffic between its line and a connecting line	16

5. The Missouri Pacific does not lose its right under Section 15 (4) of the Interstate Commerce Act by reason of having complied with Section 6 (1) of the same Act, which requires it to file with the Commission and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between points on its own line 17

6. The Commission's finding and order are not supported by substantial evidence 18

7. Atchison, T. & S. F. R. Co. v. United States, 279 U. S. 768, is not applicable 19

8. Virginian Ry. v. United States, 272 U. S. 658, is not applicable 20

Appellees Are Not Left Remediless 22

Conclusion 22

Appendix 1 25

Citations.

Atchison, T. & S. F. R. Co. v. United States (1929), 279 U. S. 768 ..... 19, 20

Dansville Board of Trade v. Dansville & Mount Morris R. Co. et al. (1932), 188 I. C. C. 580, 583 ..... 12, 17

Lemon Cove-Woodlake Assco. v. A. T. & S. F. Ry. Co. (1928), 139 I. C. C. 239, 245 14

Through Routes and Through Rates, 12 I. C. C. 163, 167 12

United States v. Missouri Pacific R. Co. (1929), 278 U. S. 269, 276, 277 ..... 14, 21

Virginian Ry. v. United States (1926), 272 U. S. 658, 666 ..... 4, 7, 9, 13, 20, 21, 22

Western Pacific Railroad Company v. Northwestern Pacific Railroad Company (1933), 191 I. C. C. 127, 131 ..... 9, 12, 13, 14, 15, 18, 21

Freight Tariffs.

Western Trunk Lines Freight Tariff No. 231-A, Agent Kipp's I. C. C. No. A-2593 15

Statutes.

Section 1, Paragraph (4), Part I, Interstate Commerce Act, 54 Stat. L. 900 [49 U. S. C., Section 1 (4)] 7, 14, 19, 26
Section 3, Paragraph (4), Part I, Interstate Commerce Act, 54 Stat. L. 903, 904 [49 U. S. C., Section 3 (4)] 2, 16, 19, 27
Section 6, Paragraph (1), Part I, Interstate Commerce Act, 34 Stat. L. 586, 41 Stat. L. 483, 49 Stat. L. 543 [49 U. S. C., Section 6 (1)] 2, 7, 10, 17, 19, 27, 28
Section 15, Paragraphs (3) and (4), Part I, Interstate Commerce Act, 54 Stat. L. 911 [49 U. S. C., Section 15 (3) (4)] 2, 6, 7, 9, 10, 14, 16, 17, 25

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1951.

No. 513.

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor,
Appellant,

vs.

UNITED STATES OF AMERICA et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division.

BRIEF FOR APPELLANT.

OPINIONS BELOW.

The opinion of the specially constituted District Court of three judges (R. 242-255) is reported at 101 Federal Supplement 48, **Thompson v. United States.**

The report and report on reconsideration of the Interstate Commerce Commission (R. 171-179, 163-171) are reported at 272 I. C. C. 368 and 278 I. C. C. 519.

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U. S. Code, §§ 1253 and 2101 (b), 62 Stat. 928, 961, 962. The final decree of the District Court (R. 235) was entered November 19, 1951. The petition for appeal (R. 236) was

filed and the order allowing appeal (R. 237) was entered on December 6, 1951. Probable jurisdiction was noted by this Court on March 3, 1952 (R. 257).

QUESTIONS PRESENTED

1. Does a finding by the Interstate Commerce Commission that through routes exist over two lines between which there is a physical track connection, but without any other evidence to support its finding, establish the existence of through routes over those lines and over which the Commission may prescribe through rates?

2. Is a physical track connection between the two lines sufficient in and of itself to establish the existence of through routes over those lines?

3. Does a carrier lose its rights under Section 15 (4) of the Interstate Commerce Act by reason of having complied with the provisions of Section 1 (4) of the same Act which requires it to establish reasonable through routes with other such carriers and just and reasonable rates applicable thereto but short of the destination involved?

4. Does a carrier lose its rights under Section 15 (4) of the Interstate Commerce Act by reason of having complied with Section 3 (4) of the same Act which requires it to afford all reasonable, proper and equal facilities for the interchange of traffic between its line and a connecting line?

5. Does a carrier lose its rights under Section 15 (4) of the Interstate Commerce Act by reason of having complied with Section 6 (1) of the same Act which requires it to file with the Commission and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between points on its own line?

6. Whether the Commission's finding and order are supported by substantial evidence.

STATUTES INVOLVED.

The statutes involved are printed in Appendix 1 hereto.

STATEMENT.

This action was brought in United States District Court for the Eastern District of Missouri by appellant, a common carrier by railroad, to set aside, annul, suspend and enjoin an order of the Interstate Commerce Commission entered July 10, 1950, in **Omaha Grain Exchange of Omaha, Nebr., v. Missouri Pacific Railroad Company (Guy A. Thompson, Trustee), and Chicago, Burlington & Quincy Railroad Company**, No. 29461 on the Commission's docket. A specially constituted Court of three judges, one member dissenting, upheld the validity of the order and dismissed appellant's complaint.

The Missouri Pacific has a line of railroad in Kansas which extends westerly from Atchison, Kans., through Concordia and beyond. The line also extends northerly from Atchison to Omaha, Nebr., and southerly from Atchison to Kansas City, Mo.

The Kansas origins involved in the complaint filed by the Omaha Grain Exchange with the Interstate Commerce Commission are local points on the Missouri Pacific west of Concordia. The Missouri Pacific has a track connection with the Burlington at Concordia, and the Burlington has a line of railroad extending from Concordia northeasterly to Omaha.

The complaint names the Missouri Pacific and Burlington as defendants and alleges that the rates they maintain on grain and grain products, in carloads, from said Kansas origins to Omaha, Nebr., are unjust and unreasonable in violation of Section 1, and subject complainant to undue

prejudice and disadvantage in violation of Section 3 of the Interstate Commerce Act (R. 1, 2). The complainant also contends and states in the complaint ". . . that the route via Concordia and the C. B. & Q. Railroad is a practicable through route as provided in Section 15 of the Interstate Commerce Act, . . ." "We failed in our negotiations with the Missouri Pacific Railroad to establish such route, hence this complaint" (R. 2).

The Commission, after hearing, found that through routes are already in existence at combination rates through Concordia by way of the Missouri Pacific and Burlington; that the only relief sought by complainant was reasonable rates over those routes; and that it was unnecessary to discuss the provisions of Section 15, (3) and (4), and that those provisions of the Act were no bar to the prescription of reasonable rates over such routes, citing **Virginian Ry. v. United States**, 272 U. S. 658, 666 (R. 163, 168).

The Commission's order of July 10, 1950 (R. 170), requires the establishment by defendants of through rates for the transportation of grain and grain products shipped from local points on the Missouri Pacific in central Kansas to Omaha, Nebr., over the route of the Missouri Pacific and Burlington through Concordia, Kans., which shall not exceed rates on like traffic from the same origins to Kansas City, Mo.

The Missouri Pacific originates all the grain traffic shipped by rail from these Kansas origins, and is therefore in a position to haul all the grain traffic shipped from these origins to Omaha over its single line route.

The appellant has contended from the beginning that (1) no through routes exist over the Missouri Pacific and Burlington via Concordia from the Kansas origins to Omaha; (2) that there is no evidence of record to estab-

lish the existence of through routes over those two lines via Concordia; (3) in the absence of through routes over said lines the Commission has no power to prescribe through rates; and (4) the Commission's order, which creates through routes over said lines through Concordia, violates Section 15 (3) and (4) of the Interstate Commerce Act and forces the appellant to short-haul itself by surrendering grain traffic which it originates to the Burlington at Concordia, Kans., for the balance of the haul to Omaha, although the appellant has its own single line which connects said Kansas origins with Omaha.

The primary question involved is whether through routes exist from the Kansas origins involved to Omaha, Nebr., by way of the Missouri Pacific and Burlington through Concordia.

The Commission concluded that they do, but without any substantial evidence to support its finding or conclusion.

The majority opinion of the lower Court is:

> "We conclude — evidence of physical interchange connection at Concordia, plus long established joint rates to some points on the Burlington short of Omaha, plus combination rates to Omaha, furnish sufficient evidentiary basis for the conclusion of the Commission of the existence of a through route and its order for reasonable rates over that route" (R. 248).

The case is here on direct appeal from the order of the District Court denying the injunction and dismissing the complaint.

SPECIFICATION OF ERRORS.

Appellant relies upon all the errors assigned in its Assignment of Errors (R. 238-241). The basic errors of the District Court, however, may be summarized as follows:

(1) The Court erred in failing to set aside said Order of the Commission on the ground that there is no evidence of record before the Commission to base and support its finding that through routes exist on grain and grain products from points in Kansas located on the Missouri Pacific Railroad (Concordia and west thereof) to Omaha, Nebr., over the Missouri Pacific and Burlington via Concordia.

(2) The Court erred in failing to set aside the order of the Commission on the ground that the Commission was without power to prescribe through rates from the Kansas origins involved to Omaha in the absence of substantial evidence supporting the existence of through routes over the Missouri Pacific and Burlington via Concordia or without first making an order requiring the establishment of through routes in accordance with the provisions of Section 15 (3) and (4) of the Interstate Commerce Act (54 Stat. L. 911) (49 U. S. C. A., Section 15, Paragraphs 3 and 4).

(3) The Court erred in finding or holding that "The complaint before the Commission sought no relief under Section 15 of the Act."

(4) The Court erred in failing to set aside the order of the Commission on the ground that said order is based on the following erroneous findings: (a) That through routes are already in existence from the Kansas origins to Omaha by way of the Missouri Pacific and Burlington through Concordia; (b) That the only relief sought by the complainant was reasonable rates over those routes; and (c)

That it was unnecessary to discuss the provisions of Section 15 (3) and (4), since in the Commission's opinion those provisions of the Act constituted no bar to the prescription of reasonable rates over such routes.

(5) The Court erred in failing to make a positive finding that physical rail track connections alone do not constitute, or establish the existence of, through routes.

(6) The Court erred in failing to find that there is no evidence of record of any arrangement between the Missouri Pacific and Burlington for the continuous carriage of grain and grain products or any other commodity from these Kansas origins to Omaha, Nebr., and Council Bluffs or beyond.

(7) The Court erred in finding or holding that the facts in **Virginian Railway Company v. United States**, 272 U. S. 658, disclose a striking analogy to the present case.

(8) The Court erred in failing to find that the duty of the Missouri Pacific to establish through routes with other carriers and just and reasonable rates as required by Section 1 (4), to provide equal facilities for the interchange of traffic between its line and connecting lines as required by Section 3 (4), and to file with the Commission schedules showing all rates between points on its line which may be used in combination with local rates of another connecting line as required by Section 6 (1) of the Interstate Commerce Act, are all subordinate to the rights of the Missouri Pacific under Section 15 (4) of the Interstate Commerce Act.

(9) The Court erred in failing to hold that the Commission is without power to prescribe through rates (joint or local rates which may be used in combination) between points on two or more lines in the absence of through routes over those lines, or an order by the Commission made pursuant to the provisions of Section 15 (3) and (4)

requiring the establishment of through routes over those lines.

(10) The Court erred in finding or holding that the "evidence of physical interchange connection at Concordia, plus any established joint rates to some points on the Burlington short of Omaha, plus combination rates to Omaha, furnish sufficient evidentiary basis for the conclusion of the Commission of the existence of through route and its order for reasonable rates over that route."

(11) The Court erred in failing to find that the flow of grain from these Kansas origins into the primary markets is channeled on the basis of a rate adjustment prescribed by the Interstate Commerce Commission and which order prescribing said rates was published to become effective on July 1, 1935, and, subject to the general increases approved and authorized by the Commission, is in effect at the present time.

(12) The Court erred in failing to find that the order of the Commission of July 10, 1950, is predicated upon a misconstruction of the Interstate Commerce Act, and that it is unlawful, beyond the power of the Commission, arbitrary, capricious, unsupported by essential findings, and contrary to and without support in the evidence.

(13) The Court erred in denying the injunction and in dismissing plaintiff's complaint.

SUMMARY OF ARGUMENT.

The complainant before the Commission recognized there were no through routes from the Kansas origins involved to Omaha, Nebr., over the lines of the Missouri Pacific and Burlington through Concordia, Kans., so by complaint filed with the Commission the Omaha Grain Exchange invoked Section 15 (3) of the Interstate Commerce Act and contended that the Commission should require the establishment of through routes over said lines through Concordia and then prescribe reasonable and non-prejudicial through rates over said through routes.

The Commission concluded, however, that through routes are already in existence from the Kansas origins involved to Omaha, Nebr., over the lines of the Missouri Pacific and Burlington through Concordia and that it was unnecessary to discuss the provisions of Section 15 (3) and (4), and that those provisions of the Act were no bar to the prescription of reasonable rates over such routes, citing **Virginian Ry. v. United States**, 272 U. S. 658, 666 (R. 168).

There is no evidence that through routes exist from the Kansas origins involved to Omaha, Nebr., over the lines of the Missouri Pacific and Burlington through Concordia. Absent through routes over said lines the Commission has no power to prescribe through rates over said lines and the **Virginian Ry. Case**, supra, therefore, has no application (**Western Pacific Railroad Company v. Northwestern Pacific Railroad Company**, 191 I. C. C. 127, 131).

The Commission made no effort to support its conclusion that through routes already exist over said lines to Omaha notwithstanding the contention of complainant as stated in the complaint (R. 2) and evidence of record which make it clear that through routes do not exist over said two lines (R. 8, 11, 13). The complainant looked to the Commission to require the establishment of additional through routes from the Kansas origins involved to Omaha, Nebr.

The Kansas origins involved are local points on the Missouri Pacific, the appellant, and it has a single line route from said origins to Omaha. Section 15 (4) of the Interstate Commerce Act protects the long haul of the Missouri Pacific on the grain traffic it originates at these Kansas origins and can transport over its single line route to Omaha.

Absent the existence of through routes from said Kansas origins to Omaha over the lines of the Missouri Pacific and Burlington through Concordia, it was necessary before the Commission could establish said additional through routes for it to find as required by Section 15 (3) of the Interstate Commerce Act, but subject to the limitations imposed upon its power by Section 15 (4), that additional through routes were necessary or desirable in the public interest.

The Commission made no effort to make the necessary findings required by Section 15 (3) of the Act. It concluded that it was unnecessary because through routes were already in existence over said two lines.

The evidence relied upon by the Court to furnish sufficient evidentiary basis for the conclusion of the Commission of the existence of through routes over the lines of the Missouri Pacific and Burlington through Concordia and its order for reasonable rates over those routes would have the effect of completely nullifying the provisions of Section 15 (4) of the Interstate Commerce Act and remove the last vestige of protection the carriers have in preserving their long haul. Stated another way, the appellant by complying with its duty under Sections 1 (4), 3 (4) and 6 (1) of the Interstate Commerce Act would waive its right under Section 15 (4) which protects it against short hauling. It was not the intention of Congress, we submit, to establish a rule that a carrier's compliance with its duty under those sections of the Act should cause it to lose a right given to it under Section 15 (4).

ARGUMENT.

There Is No Evidence of Record to Support the Commission's Finding or Conclusion That Through Routes Exist From the Kansas Origins Involved to Omaha, Nebr., Over the Lines of the Missouri Pacific and Burlington Through Concordia.

The Commission made no effort to support its finding or conclusion that ". . . through routes are already in existence . . ." (R. 168). It merely declared that they were and thereby avoided the provisions of Section 15 (3) and (4) of the Interstate Commerce Act, although the Omaha Grain Exchange in the complaint filed with the Commission contended, first, for the prescription of through routes from the Kansas origins to Omaha, Nebr., by way of the Missouri Pacific and Burlington through Concordia on the theory that said lines afforded practicable through routes. And, secondly, the prescription of through rates over the through routes thus prescribed.

That the Omaha Grain Exchange recognized that through routes by way of the Missouri Pacific and the Burlington through Concordia do not exist from the Kansas origins involved to Omaha and that it did invoke Section 15 (3) of the Interstate Commerce Act in order that said through routes might be established are confirmed by repeated statements of record by the witness for the Omaha Grain Exchange (its traffic manager) to the effect that said two lines would be a practicable through route as provided in Section 15 of the Act; that the Missouri Pacific refused to establish such route; and it, therefore, filed its complaint with the Commission in an effort to have said routes established (R. 8, 11, 13).

Furthermore, there is no evidence of record to support the existence of through routes over those lines from the Kansas origins to Omaha. In fact, it was admitted by the Omaha Grain Exchange's traffic manager that it never

made a shipment over those lines (R. 13). There is no evidence of such incidents as the billing, the transfer from one carrier to another, the collection and division of transportation charges, the use of a proportional rate to or from junction points or basing points, and other like incidents of transportation which the Commission said in **Through Routes and Through Rates**, 12 I. C. C. 163, 167, may properly be depended upon for guidance as to the existence of a through route.

There is a physical track connection between the Missouri Pacific and Burlington at Concordia, but Counsel for the Government admitted in oral argument "that the fact of physical connection alone was not sufficient to establish a through route" (R. 210).

Physical Track Connection Between Two Lines Does Not in and of Itself Establish the Existence of Through Routes Over Those Lines.

The fact that there is a track connection between the Missouri Pacific and Burlington at Concordia is the only possible ground upon which the Commission could conclude that "through routes are already in existence."

As previously stated, however, Counsel for the Government admitted in oral argument "that the fact of physical connection alone was not sufficient to establish a through route."

In **Dansville Board of Trade v. Dansville & Mount Morris R. Co. et al.**, 188 I. C. C. 580, it is made clear that an order requiring the construction and operation of a direct track connection for the interchange of traffic between two railroads does not establish the existence of a through route over those lines.

In **Western Pacific Railroad Company v. Northwestern Pacific Railroad Company**, 191 I. C. C. 127, 130, 131, the Commission said:

"Connecting routes do not necessarily constitute through routes over which carriers may be forced to establish joint rates. The rights of connecting carriers afforded by the act must be safeguarded, and in addition the necessity and desirability for the establishment of such through routes must be in the public interest."

The District Court likewise declared:

"Physical connection of the tracks alone does not **necessarily** mean a through route exists." (Emphasis supplied.) (R. 246.)

That statement in the majority District Court opinion is not a positive declaration of the law and to that extent has a weakening influence upon the rights preserved to the carriers under Section 15 (4) of the Interstate Commerce Act.

Does "physical connection of the tracks" become a positive and controlling fact when considered in connection with other facts none of which would, when considered separately or collectively, support the Commission's finding or conclusion ". . . through routes are already in existence . . .?" In order to properly safeguard the rights of connecting carriers afforded by the Act, and prevent the Commission from hereafter **converting what is primarily a routing case into a rate case** merely by finding or concluding that through routes are already in existence simply because there is a physical track connection, and thereby bringing the matter within the scope of the **Virginian Ry. Co. case**, 272 U. S. 658, upon which the Commission relies, the Court should declare positively that connecting routes do not constitute through routes over which carriers may be forced to establish joint rates.

The Missouri Pacific Does Not Lose Its Rights Under Section 15 (4) of the Interstate Commerce Act by Reason of Having Complied With the Provisions of Section 1 (4) of the Same Act Which Requires It to Establish Reasonable Through Routes With the Burlington to Destinations SHORT of Omaha.

The Missouri Pacific has its single line route from each of the Kansas origins to Omaha, Nebr. There is no evidence of record in this case that additional through routes between said points are necessary or desirable in the public interest. **United States v. Mo. Pac. R. Co.**, 278 U. S. 269, 276, 277. The Commission makes no attempt to make such finding as it is required to do under Section 15 (3) of the Act.

There are obviously points on the Burlington between Concordia and Omaha which cannot be served by the Missouri Pacific route through Atchison, Kan. Consequently, under Section 1 (4) of the Act, Missouri Pacific was under a duty to establish reasonable through routes upon request therefor from the origin points to Concordia on its line, and from Concordia to points **short** of Omaha on the Burlington. The Missouri Pacific has complied with this duty.

In **Lemon Cove-Woodlake Asso. v. A. T. & S. F. Ry. Co.**, 139 I. C. C. 239, 245, the Commission said:

> ". . . the general provisions of section 1 (4), that carriers shall establish through routes and reasonable rates applicable thereto, are subordinate to the specific provisions of section 15 for establishment of through routes and joint rates."

In **Western Pacific Railroad Company v. Northwestern Pacific Railroad Company**, 191 I. C. C. 127, 131, the Commission said:

"Our power to require the establishment of through routes and to prescribe joint rates is contained in section 15 of the act, paragraphs 1, 3 and 4.

"Paragraph 1 authorized the prescription of just and reasonable joint rates. Paragraph 3 authorizes the establishment of through routes and joint rates when necessary or desirable in the public interest, and paragraph 4 contains the restrictions as to short hauling. In **United States v. Missouri Pac. R. Co.**, 278 U. S. 269, at page 276, the court said:

> 'The act does not give the Commission authority to establish all the through routes it may deem necessary or desirable in the public interest. The general language of paragraph (3) is limited by paragraph (4). The latter lays down the rule that, subject to specified exceptions, a carrier may not be compelled to participate in a through route which does not include substantially its entire line lying between the termini of the route. The purpose is to protect the long haul routes of carriers.'"

Thus, it is shown that it was not the intention of Congress to establish a rule that a carrier's compliance with its duty under Section 1 (4) of the Act should cause it to lose a right given to it under Section 15 (4). The fact, therefore, that there is or may be through routes to destinations on the Burlington **short** of Omaha does not prove and is not supporting evidence of the finding and conclusion by the Commission that through routes are already in existence from the Kansas origins to Omaha by way of the Missouri Pacific and Burlington through Concordia.

Neither does the publication of class rates in the Kipp tariff[1] alter the situation because Item 330-B thereof specif-

---

[1] Western Trunk Lines Freight Tariff, No. 231-A, Agent Kipp's I. C. C. No. A-2593 (R. 228, 229).

ically provides that the class rates published therein from the points in Kansas here involved on the Missouri Pacific to Omaha apply only over the Missouri Pacific Railroad **direct.** Any class rates published therein from these Kansas origins to destinations on the Burlington via Concordia and **short** of Omaha would not prove the existence of joint through routes **to Omaha.**

There is published in the same tariff a restriction for the Burlington which is similar to that of the Missouri Pacific. (See Item 250-C.) This item provides, in effect, that the class rates published in the same general territory here involved between any two points located on the Burlington apply **only** over the Burlington direct.

The Missouri Pacific Does Not Lose Its Rights Under Section 15 (4) of the Interstate Commerce Act by Reason of Having Complied With Section 3 (4) of the Same Act Which Requires It to Afford All Reasonable, Proper and Equal Facilities for the Interchange of Traffic Between Its Line and a Connecting Line.

The carriers are required by Section 3 (4) of the Interstate Commerce Act to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and connecting lines.

The Missouri Pacific and Burlington have complied with provisions of that section of the Act by establishing interchange facilities between their lines at Concordia, Kans., and thereby affording through routes from the Kansas origins involved to destinations on the Burlington **short** of Omaha, Nebr.

Concordia is listed in the Official Register as a point of interchange between the Missouri Pacific and Burlington, but that is not evidence to support the finding of through routes over those two lines via Concordia **to Omaha.** Since

there are admittedly through routes from the Kansas origins involved to destinations on the Burlington **short** of Omaha over the Missouri Pacific and Burlington through Concordia, it is difficult to see how Concordia could be listed otherwise. The listing of Concordia as a point of interchange between the two lines in the Official Register adds nothing by way of proof that through routes exist from said Kansas origins to Omaha by way of the Missouri Pacific and Burlington through Concordia. Neither does the fact that there are physical track connections between the two lines at that point.

In **Dansville Board of Trade v. Dansville & Mount Morris R. Co. et al.**, 188 I. C. C. 580, 583, the Commission makes clear that track connections between two railroads does not establish the existence of through routes over those lines and holds that Section 15 (4) does not debar an order requiring the construction of track connections, but that it is pertinent with respect to the establishment of through routes.

The Missouri Pacific Does Not Lose Its Right Under Section 15 (4) of the Interstate Commerce Act by Reason of Having Complied With Section 6 (1) of the Same Act, Which Requires It to File With the Commission and Print and Keep Open to Public Inspection Schedules Showing All the Rates, Fares and Charges for Transportation Between Points on Its Own Line.

Section 6 (1) of the Interstate Commerce Act requires every common carrier, subject to Part I of the Act, to file with the Commission and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, . . . **when a through route and joint rates have been established.** It

will be observed from a reading of Section 6 (1) that the Missouri Pacific and Burlington are each under a separate duty to file, print and keep open to public inspection all rates and charges for transportation between different points on their respective lines. In the absence of a through route over those lines, neither the Missouri Pacific nor the Burlington is under any duty to publish rates from a point on its lines to a destination on the other line. Neither has the Commission the power to prescribe a through rate over those lines in the absence of a through route. In other words, the Missouri Pacific and Burlington by complying with the provisions of Section 6 (1) do not lose any rights granted to them under Section 15 (4) of the Interstate Commerce Act. Stated in another way, the fact that the Missouri Pacific is required by Section 6 of the Act to publish local rates between these Kansas origins and Concordia, Kans., and the Burlington Railroad is required to publish and maintain local rates between Concordia and all points on its line, including Omaha, is no evidence of the existence of through routes over those two lines **between these Kansas origins and Omaha, Nebr.**, because they are under a duty as required by Section 6 (1) to publish local rates between all points on their respective lines. Neither could the Commission require them to reduce their local factors so as to compose a more reasonable through rate **in the absence of through routes over those two lines** from these Kansas origins to Omaha, Nebr. **Western Pacific R. R. Co. v. Northwestern Pacific R. R. Co.**, 191 I. C. C. 127, 131, 133.

The Commission's Finding and Order Are Not Supported by Substantial Evidence.

The District Court in an effort to sustain the conclusion of the Commission of the existence of through routes and its order for reasonable rates over those routes stated:

"We conclude—evidence of physical interchange connection at Concordia, plus long established joint rates to some points on the Burlington short of Omaha, plus combination rates to Omaha, furnish sufficient evidentiary basis for the conclusion of the Commission of the existence of a through route and its order for reasonable rates over that route."

We have treated under the five preceding headings the evidentiary basis which the District Court says is sufficient to support the Commission's conclusion. A proper appraisal of the evidentiary basis however discloses that no single bit of evidence taken alone or considered as a whole is sufficient to justify the Commission's conclusion. To conclude otherwise would be to hold that it was the intention of Congress to establish a rule that a carrier's compliance with its duty under Sections 1 (4), 3 (4) and 6 (1) of the Interstate Commerce Act should cause it to lose a right given it under Section 15 (4) of the same Act.

Atchison, T. & S. F. R. Co. v. United States, 279 U. S. 768, Is Not Applicable.

The Omaha Grain Exchange assailed the rates from the Kansas origins to Omaha over routes which are not in existence. It did not complain of the reasonableness of the rates from the Kansas origins to Concordia over the Missouri Pacific, nor did it complain of the reasonableness of the rates from Concordia fo Omaha over the Burlington; and the Commission could not therefore prescribe local rates on the respective lines. That issue was not before it.

If through routes existed from the Kansas origins involved to Omaha over the Missouri Pacific and Burlington through Concordia, the appellant would not dispute the right of the Commission to prescribe through rates (joint or combination of locals), but, the fact is that through routes do not exist over those lines from the Kansas origins

to Omaha. Therefore, the decision by the United States Supreme Court in **Atchison, T. & S. F. R. Co. v. United States,** 279 U. S. 768, upon which the Commission also relies, is not applicable.

Virginian Ry. v. United States, 272 U. S. 658, Is Not Applicable.

The facts in the **Virginian Ry. Case** are different in several important respects from those in the instant case, and that decision is not therefore controlling.

The Virginian Railway and the Chesapeake and Ohio and Norfolk and Western Railways served an extensive coal mining district in West Virginia. The line of the Virginian extended only eastward to Tidewater. The lines of the Chesapeake and Ohio and Norfolk and Western extended from the Atlantic Ocean to the Middle West. Ninety-nine mines were located on the Virginian. Of these, forty-five mines enjoyed, by reason of a trackage agreement between the Chesapeake and Ohio and the Virginian, the same rates to the west as did the mines located on the Chesapeake and Ohio and the Norfolk and Western. Some of the remaining fifty-four mines located on the Virginian, who were denied access to the western markets, complained to the Commission under both Sections 1 and 3 of the Act to Regulate Commerce. The Commission found that the rates the mines complained about were unreasonable and unduly prejudicial, and ordered the rates prescribed to be established.

The Virginian Railway, on appeal to the Courts, contended that the Commission's order was void because the Commission directed the establishment of through routes and joint rates without finding that they were necessary in the public interest, as required by Section 15 (3) of the Act. The Supreme Court said, however (l. c. 666),

". . . the order here in question was not sought or made under section 15 (3) and does not direct the establishment of through routes and joint rates. **Through routes to the West were already in existence.** And there were through rates by combination." . . . (Emphasis supplied.)

In the instant case, the Missouri Pacific does not join with any carrier in through routes from the Kansas origins involved to Omaha, Nebraska. It has its single-line route which connects said Kansas origins with Omaha. The complaint against the rates was made under Sections 1, 3 of the Interstate Commerce Act, and Section 15 (3) was also invoked. The Commission prescribed reasonable rates under Section 1 only, and stated that it was unnecessary to discuss the provisions of Section 15 (3) and (4) as through rates were already in existence at combination rates over the lines of the Missouri Pacific and the Burlington through Concordia.

Thus, it is shown that in the **Virginian Ry. Case** the Virginian Railway had joined the Chesapeake and Ohio Railway in through routes from some but not all of the mines served by it and a Section 3 order was entered to remove the undue prejudice against the other mines which complained. Section 15 (4) of the Act is no protection to the carriers in such a situation as is noted by the exception in the section itself, i. e., ". . . (except as provided in section 3, . . .) . . ." In the instant case, said exception does not come into operation because the Missouri Pacific does not join with any carrier in through routes from the Kansas origins to Omaha. There was not therefore any basis for a Section 3 order and none was made. **Western Pacific R. R. Co. v. Northwestern Pacific R. R. Co.**, 191 I. C. C. 127, 134; **United States v. Mo. Pac. R. Co.**, 278 U. S. 269, 277. Whether the Section 1 order of the Commission is a valid order depends upon whether through routes existed from the Kansas origins involved to Omaha

over the lines of the Missouri Pacific and Burlington through Concordia.

In the **Virginian Ry. Case** through routes existed as a fact. In the instant case that is the primary issue. The **Virginian Ry. Case** is not therefore controlling.

Appellees Are Not Left Remediless.

The principle involved in this case is important to every railroad in this country. If the decision of the Commission and the District Court stand it will remove the last vestige of protection which the carriers have in preserving their long haul. The Omaha Grain Exchange, on the other hand, is not so unfortunate. If the Commission had interpreted its complaint as being primarily a routing case and not strictly a rate case and could have on the basis of the evidence before it made the necessary findings required by Section 15 (3) but subject to the limitation imposed upon its power by Section 15 (4), the Omaha Grain Exchange could have had the same relief that it would have if the lower Court's judgment and decree is affirmed.

If it is only rate relief which the Omaha Grain Exchange seeks, then the Commission, by its report and that of Division 2, has laid the predicate whereby the Omaha Grain Exchange might secure that relief over the single line of the Missouri Pacific direct upon the filing of a proper complaint. It would, therefore, seem that the equities of the entire situation demand a reversal of the lower Court's final judgment and decree.

CONCLUSION.

The final judgment and decree of the District Court should be reversed and the cause remanded to that Court with directions to set aside the order of the Interstate Commerce Commission and remand the case to that Com-

mission for further proceedings in conformity with the opinion of this Court.

Respectfully submitted,

.....

T. T. RAILEY,

.....

GEO. W. HOLMES,

.....

TOLL R. WARE,

Attorneys for Appellant.

2008 Missouri Pacific Building,
St. Louis 3, Missouri.

Receipt Acknowledged Date

....

....

....

APPENDIX 1.

Statutes Involved.

Section 15, Paragraphs (3) and (4), Part I, Interstate Commerce Act, 54 Stat. L. 911 (49 U. S. C., Sec. 15), which read as follows:

"(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to Part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

"(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to

embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: **Provided, however,** That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Section 1, Paragraph 4, Part I, Interstate Commerce Act, 54 Stat. L. 900 [49 U. S. C., Sec. 1 (4)], which reads as follows:

"(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to estab-

lish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3, Paragraph 4, Part I, Interstate Commerce Act, 54 Stat. L. 903, 904 [49 U. S. C., Sec. 3 (4)], which reads as follows:

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 6, Paragraph 1, Part I, Interstate Commerce Act, 34 Stat. L. 586, 41 Stat. L. 483, 49 Stat. L. 543 [49 U. S. C., Sec. 6 (1)], which reads as follows:

"(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part."